S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the formal complaint of CMC TELECOM, INC. against MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN to require AT&T Michigan to adequately offer the telecommunications services in its individual case basis contracts for resale.	)	Case No. U-17035

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on November 27, 2012.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 4300 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before December 11, 2012, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before December 21, 2012. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by

action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Thomas E. Maier

Digitally signed by Thomas E. Maier
DN: cn=Thomas E. Maier, c=US, email=MaierT@michigan.gov
Date: 2012.11.27 16:11:35 -05'00'

_____

Thomas E. Maier
Administrative Law Judge

November 27, 2012
Lansing, Michigan

S T A T E O F M I C H I G A N

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the formal complaint of CMC TELECOM, INC. against MICHIGAN BELL TELEPHONE COMPANY D/B/A AT&T MICHIGAN to require AT&T Michigan to adequately offer the telecommunications services in its individual case basis contracts for resale.	)))))))	Case No. U-17035

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

This case involves a Complaint filed by CMC Telecom, Inc. (Complainant or CMC) against Michigan Bell Telephone Company d/b/a AT&T Michigan (AT&T) alleging that AT&T failed to comply with the October 4, 2011 Order on Remand of the Michigan Public Service Commission (Commission) in MPSC Case No. U-14975 (October 4 Order) that held that "AT&T Michigan may not withhold completely from competitors the terms of its individualized contracts, but must make available to them sufficient details such that the competitor can understand what is included in the offer." October 4 Order, p 2. The October 4 Order resulted from protracted litigation between CMC (and others) and AT&T relating to, among other things, the obligation of AT&T to disclose its

individualized contracts with its retail customers (ICB contracts or ICBs) so that CLECs, such as CMC, can resell those ICBs to their customers.

As background,[1] in Case No. U-14975, the Michigan Communications Carriers Association, CMC, and Grid 4 Communications, Inc. (Grid 4) filed a Complaint and Request for Declaratory Ruling against AT&T alleging that AT&T's provisions for resale services were contrary to the Michigan Telecommunications Act , MCL 484.2101 *et seq.* (MTA), and the Federal Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252 (FTA). Pursuant to the MTA, the Commission conducted a contested case proceeding to consider the parties' claims. At the conclusion of the contested case proceeding, the Commission issued its Order, determining, in pertinent part, that AT&T's ICB contract pricing complied with the resale obligations imposed by federal law. MPSC Case No. U-14975, Order, February 27, 2007, pp 16-22. In describing ICB contracts, the MPSC acknowledged that an ILEC such as AT&T must allow such a retail agreement to be resold to CLEC customers, at the wholesale discount; however, the MPSC stated that it is reasonable on its face for the ILEC to determine if the CLEC's customer is similarly situated to its ICB contract customer. *Id*. at p 19. The MPSC stated:

> When AT&T Michigan enters into an ICB contract, it must permit that contract to be resold either to the same customer or to a similarly situated one. However, it is under no obligation to offer a wholesale discount off its discounted prices for components of an ICB contract offered to another individual customer. The requirement that a customer be similarly situated is reasonable on its face. *Id*.

[1] MPSC Staff has presented an exhaustive explanation of the history of these earlier proceedings, much of which the ALJ has incorporated into this PFD.

Recognizing that potential problems may emerge when identifying whether a potential CLEC ICB contract customer is similarly situated, the MPSC recommended that ILECs and CLECs should define "similarly" in the parties' interconnection agreement. The MPSC stated:

> How that determination of similarity is made should be addressed in an interconnection agreement. If there is a dispute as to the reasonableness of the determination, the interconnection agreement dispute resolution procedures may apply, before a challenge comes to the Commission. *Id*. at 19.

CMC and Grid 4 filed a Complaint challenging the MPSC's February 27, 2007 Order to the Western District of the U.S. District Court. In CMC/Grid 4's Amended Complaint at the U.S. District Court, CMC/Grid 4 alleged that the MPSC committed four errors. The one most pertinent here is the CMC/Grid 4 claim that the MPSC erred by failing to require AT&T to sufficiently offer its ICB contracts to CLECs by not requiring AT&T to disclose its ICB contract prices. In addition, CMC/Grid 4 alleged that the MPSC failed to find that AT&T's requirement that a CLEC's end user must be similarly situated to AT&T's ICB customer to qualify for ICB pricing is unreasonable and discriminatory. After conducting a *de novo* review, the U.S. District Court upheld the MPSC's Order holding that the order did not violate federal law. *CMC Telecom, Inc v Michigan Bell Telephone Co*, 654 F Supp 2d 677 (WD Mich, 2009).

CMC appealed the U.S. District Court's Order to the Sixth Circuit of the United State Court of Appeals. After review of the parties' arguments, the Sixth Circuit issued its Opinion and addressed the issues raised. In this opinion, the Sixth Circuit discussed the issue of disclosure of ICB contracts and indicated that

all the parties agreed that the resale duty extends to ICB contracts but disagreed as to what constitutes an "offer" under the FTA. *CMC Telecom, Inc v Michigan Bell Telephone Co,* 637 F3d 626, 629 (6th Cir, 2011) (*CMC Sixth Circuit case*). At the Sixth Circuit, AT&T argued that "unconsented disclosure of individualized contracts would constitute a violation of another of AT&T's duties under the FTA: the duty to protect customer proprietary network information." *Id*. at 630. In contrast, CMC asserted that "AT&T is not truly offering its individualized contracts for resale because AT&T will not disclose any information about the contracts unless a competitor first obtains customer consent." *Id*. After considering these arguments, the Court determined that "…AT&T is required by law to offer all of its retail services for resale, and this disclosure duty applies even when redaction cannot fully mask customer identity. Therefore, the commission erred in permitting AT&T to withhold completely the terms of its individualized contracts from competitors." *Id*. at 631. In its concluding paragraph, the Sixth Circuit held:

> In conclusion, AT&T must disclose the terms of its individualized contracts to the extent necessary for CMC to understand the nature of what is being offered. The district court's holding is reversed in this respect, and the case must be remanded for the commission to modify its order. The district court's affirmance of the commission is otherwise upheld. The commission did not violate the Act by determining that AT&T's "similarly situated" requirement was not a restriction on resale. *Id*. at 633.

The 6th Circuit remanded the proceeding back to the U.S. District Court, who remanded the case back to the Commission on September 7, 2011. On remand, the Commission modified its original Order to "reflect that AT&T Michigan may not completely withhold the terms of its ICBs from competitors, but must make available to them sufficient details such that the competitor can

understand what is included in the offer. That requirement must be met even when the customer may be identified despite its name being redacted from the contract." October 4 Order, p 2. The remainder of the Commission's February 27, 2007 Order was left unchanged.

On May 23, 2012, CMC brought its Complaint in this case, alleging that AT&T is in violation of the Commission's October 4 Order. A prehearing was held on June 27, 2012, before Administrative Law Judge (ALJ) Thomas E. Maier. Complainants were represented by attorneys Gary L. Field and Norman C. Witte. AT&T was represented by attorneys Mark R. Ortlieb and Dennis G. Friedman (admitted *pro hac vice*). The Commission Staff (Staff) was represented by Assistant Attorney General Anne M. Uitvulgt. A consensus schedule was set by the parties. 1 TR 5. After the pre-hearing, a protective order was entered into on July 10, 2012, and revised on July 24, 2012. AT&T filed its testimony on July 20, 2012, and CMC submitted rebuttal testimony on August 8, 2012.

The record reflects that multiple rounds of discovery were conducted and that several depositions were taken. In addition, multiple motions were argued in front of the ALJ. These included AT&T's June 22, 2012 Motion to Dismiss (AT&T Motion 1) (taken under advisement) and AT&T's August 7, 2012 Renewed Motion to Dismiss the Complaint (AT&T Motion 2), as well as multiple motions relating to discovery issues and other matters. Oral argument on AT&T's Motions to Dismiss was held on July 9, 2012, and August 21, 2012. This Proposal for Decision (PFD) addresses AT&T's Motions to Dismiss. On August 29-30, 2012, cross-examination of the parties' witnesses was conducted.

Complainants presented two witnesses, Craig M. Champagne and Rhoni Hamel. AT&T presented one witness, Patricia H Pellerin. Staff presented no witnesses.

On September 13, 2012, initial briefs were filed by CMC,[2] AT&T, and Staff. On September 27, 2012, reply briefs were filed by the same parties. The evidentiary record consists of six volumes of public transcript, consisting of 640 pages of transcript, and 44 exhibits admitted into evidence. Five of the exhibits were admitted into evidence under the provisions of a Revised Protective Order and were admitted under seal pursuant to the provisions of the Revised Protective Order. The confidential Exhibits are Exhibits CMC-9, CMC-14, CMC-17, ATT-2, AND ATT-10. The parties entered into and filed a Stipulation with regard to extending the schedule in this case.

II.

AT&T's MOTIONS TO DISMISS

AT&T requests dismissal of CMC's Complaint because there can be no claim for violation of the substantive requirements of the October 4 Order because the exclusive mechanism for enforcing those requirements is entry into and enforcement of an interconnection agreement. AT&T Motion 1, pp 5-6; AT&T Motion 2, pp 5-8.[3] Therefore, AT&T contends that CMC's Complaint fails to state a claim that the Commission can address. *Id.* AT&T also contends that

[2] CMC filed both Confidential and Public versions of its Initial Brief. The ALJ believes that the issues can be addressed in this case without disclosing confidential information. All references to CMC's Initial Brief cite to pages in the Confidential version.

[3] AT&T renews its request for dismissal in its Initial Brief. AT&T Initial Brief, pp 6-13. Its earlier pleadings relating to its Motions to dismiss are incorporated by reference. *Id.* at p 7, fn 4. The ALJ will discuss AT&T's entire requests for dismissal in this Section.

CMC's Complaint, without reference to its interconnection agreement, is, among other things, an attempt to avoid the mandatory mediation provisions in the MTA (*see*, MCL 484.2203(14)). AT&T Motion 1, p 10. Further, AT&T argues that CMC has brought this complaint to avoid various provisions of their interconnection agreement, including the limitation on damages provision. *Id.* at p 11. AT&T also contends that CMC's Complaint should be dismissed because the Commission is addressing the issue of ICB disclosure in Case No. U-16906. *Id.* at pp 11-12; AT&T Motion 2, pp 8-12. Finally, AT&T contends that the October 4 Order is not controlling because that case involved a resale tariff.[4] AT&T Reply in Support of Motion, pp 3-4. Other than these last two arguments, the other arguments were raised and rejected by the Commission in its February 27 Order in MPSC Case No. U-14975.

AT&T cites *Verizon North, Inc v Strand*, 309 F3d 935 (6th Cir, 2002) (*Verizon North*) for the proposition that the Commission is not the proper venue for establishing a process that "would allow competitors to circumvent the negotiation and arbitration process set out in § 252 of the [FTA]."[5] In *Verizon North*, Verizon brought suit against the Commission under the FTA, challenging its Order requiring Verizon to publish tariffs offering to sell elements of its telecommunications network to CLECs at rates predetermined by the Commission. The District Court concluded that the Commission tariff requirement was improper because it violated the FTA by effectively eliminating

[4] AT&T withdrew its resale tariff effective August 9, 2011, after the Sixth Circuit issued its Opinion, but before the case had been remanded to the Commission and before the issuance of the Commission's October 4 Order.
[5] *Verizon North*, 309 F3d at 938.

the parties ability or incentive to privately negotiate interconnection agreements and permitting CLECs to obtain items required under § 251 without the necessity of negotiating an interconnection agreement. The court held that "Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act."[6] The District Court's decision was affirmed by the Sixth Circuit, which held that the tariff requirement was preempted by the FTA because it bypassed and ignored the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbent's services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review.[7]

AT&T alleges that this case is similar to those in *Verizon North* because recognition of a claim for violation of the October 4 Order would unlawfully bypass the interconnection scheme in the FTA.

Similarly, AT&T cites *Michigan Bell Tel Co v Strand*, 305 F3d 580, 582 (6th Cir, 2003) (*Michigan Bell*) for the proposition that access to an ILEC's network facilities comes only through specified procedures for forming interconnection agreements, the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the FTA. It also cites *Michigan Bell Tel Co v MCIMetro Access Trans Servs, Inc*, 323 F3d 348, 359 (6th Cir, 2003) (*MCIMetro*) for the proposition that once an interconnection

[6] *Id.* at 940.
[7] *Id.* at 941.

agreement is approved, the general duties under the FTA do not control and parties are governed by the interconnection agreement instead. In the same vein, AT&T cites *Law Office of Curtis V Trinko, LLP v Bell Atl Corp*, 305 F3d 89, 104 (2d Cir, 2002), *rev'd in part on other grounds sub nom., Verizon Commc'ns, Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004) (*Trinko*) for the proposition that once a carrier enters into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement. In its Initial Brief, AT&T also cites *CGM, LLC v BellSouth Telecommunications, Inc*, 664 F3d 46 (4th Cir, 2011) for similar propositions; however, although it contains the language cited, the ALJ notes that this case was dismissed for lack of standing by the plaintiff, a billing agent for CLECs, none of whom were parties to the case, and the plaintiff was neither a CLEC nor party to an interconnection agreement.

AT&T also argues that CMC's Complaint should be dismissed because issues relating to ICB disclosure have been litigated in MPSC Case No. U-16906, and that the Commission has expressed its views on these issues in the context of that case.

CMC requests that the Commission deny AT&T's Motions to Dismiss. CMC notes that the Commission denied a similar motion by AT&T in its February 27 Order in Case No. U-14975, wherein it stated:

> Although the CLECs could have brought this issue to the fore using the dispute resolution process in their interconnection agreements, the Commission is not persuaded that this avenue is the exclusive remedy for the problems enumerated in the complaint. The Commission is not persuaded to a different conclusion by the authority AT&T Michigan cites. Those cases may be distinguished

> from the present one in a number of ways. For example, in the present case, the parties have interconnection agreements in place. There is no attempt to avoid or evade the negotiation process required in 47 USC 252. MPSC Case No. U-14975, Order, February 27, 2007, pp 6-7.

CMC also states that the Sixth Circuit has distinguished the cases upon which AT&T relies in that while AT&T relies on *Verizon North, Michigan Bell, Trinko*, none of those cases pertain to an ILEC's resale obligation. CMC Response, p 11. CMC claims that *Verizon North* dealt with mandated UNE tariffs and did not involve Resale obligations under § 251(c)(4). *Id.* *Michigan Bell* involved an ILEC's obligation to provide UNEs under 47 U.S.C. § 251(c)(3), and did not involve Resale obligations under § 251(c)(4). *Id. Trinko* involved an attempt by a customer of a CLEC to bring suit against an ILEC under § 251 without specification of which duty the ILEC allegedly violated, and the *Trinko* court found that it did not have to address the issue of whether the plaintiff had a right to bring suit for violation of the FTA "*because the plaintiff does not describe conduct by the defendant that would violate section 251 of the Telecommunications Act*." *Id*. (citing *Trinko*, 305 F3d at 102). CMC also contends that the Sixth Circuit distinguished the Second Circuit's decision in *Trinko* in *MCIMetro*. *Id.* CMC also notes that the FCC has severely criticized *Trinko* in *Core Communications, Inc* v *Verizon Maryland, Inc*, 18 FCC Rcd 7962 (rel'd April 23, 2003). In *Core*, Verizon entered into a "SGAT" (which served the function of an interconnection agreement) with Core, a CLEC. Verizon argued that its breach of its interconnection agreement with Core could not possibly constitute a violation of its federal law duty to interconnect as set forth in 47 USC

§ 251(c)(2). The FCC disagreed, finding that allowing Core to proceed with a Complaint alleging violation of federal law independent of the parties' interconnection agreement did not undermine the policy requiring negotiations of interconnection agreements. CMC Response, pp 13-14.

In responding to these assertions, AT&T states that contrary to the claims by CMC, the Commission may only address those rights and obligations set forth in the interconnection agreements. AT&T Reply, pp 7-11. AT&T also disagrees with CMC's description of the cases on which AT&T relies, stating that *Verizon North* did involve resale as well as UNEs, and the Sixth Circuit's distinguishing of *Trinko* related only to preexisting state duties that are not present here. *Id.*, pp 13-14.

CMC contends that Case No. U-16906 only involved arbitration of interconnection agreements for the 10 CLECs involved (not including CMC); it did not address past violations by AT&T of the October 4 Order or issues relating to damages. CMC's Second Response, pp 2-5. Rather, that case only involved "baseball style" arbitration of new agreements to govern prospectively. *Id.*

Staff did not file pleadings relating to AT&T's Motions to Dismiss, and did not take a position at the hearings. Staff has taken a position on at least one issue in its Initial and Reply Briefs, as discussed below.

The ALJ denied AT&T's Renewed Motion to Dismiss at the hearing thereon. 4 TR 170-171; *see also* 2 TR 68-70. The ALJ still recommends that the Commission deny AT&T's requests to dismiss the Complaint. The FTA and the MTA empower the Commission with broad supervision, interpretation, and

enforcement authority among other things, to ensure uniform, just, and reasonable application of the rules, statutes, and laws. The FTA also allows freedom of contract between parties who operate competitive businesses by allowing negotiation and arbitration of terms and provisions contained in their respective interconnection agreements. The interconnection agreements, once approved by the Commission, do govern the party's relationship. Nevertheless, the Commission's authority does not end at approval of the interconnection agreements; the Commission is also responsible for resolving disputes, implementing the FTA, and determining reasonableness, which is inherently embodied in the FTA and other applicable statutes and rules governing the Commission. Further, the Commission clearly has the authority to determine compliance with its own orders, regardless of the context in which they were issued. *See, e.g.,* MCL 484.2203(1); Commission's Rules of Practice and Procedure, R 460.17501. As such, the Commission has the authority to determine disputes where the Complainant alleges a violation of a Commission Order such as the October 4 Order. The ALJ believes this is true despite the language in the cases cited by AT&T regarding the impact of an interconnection agreement and the FTA scheme for implementation. CMC has alleged violation of a Commission Order, not its interconnection agreement. Further, the ALJ recognizes the distinguishing characteristics of this case from the cases cited by AT&T. In some of those cases, the Commission was found to have overstepped its boundaries by circumventing the entire private negotiation and arbitration process afforded to the parties under the FTA. In those cases, the parties were

not given the opportunity to enter into interconnection agreements. In this case, CMC has negotiated and entered into Interconnection Agreement with AT&T that, by its terms, is circumscribed by federal and state law. Therefore, the ALJ finds that since these issues arise under Commission Order and not the interconnection agreements entered into by the parties to this proceeding, the Complaint is properly before the Commission.

The ALJ also believes that AT&T's argument that the October 4 Order is not controlling lacks merit. First, the Commission had the opportunity to address this issue in its October 4 Order by indicating that the required disclosure related only to the extent AT&T had a resale tariff in effect. The Commission did not do so. Second, AT&T's own actions belie this argument. After the October 4 Order, CMC contacted AT&T to obtain ICB disclosures as required by the October 4 Order. Ex. CMC-1, CMC-2. AT&T responded that it intended to comply, it provided 26 ICBs to CMC manually, and it set up an area on CLEC Online to make ICBs available to CLECs. *See*, *e.g.,* Ex. CMC-3, CMC-5, CMC-6, CMC-7 and CMC-8. If AT&T believed that the October 4 Order had no application because it had withdrawn its resale tariff, all of those actions by AT&T would have been unnecessary. Third, although Staff took no position on the issue at the hearing, Staff has now taken the position that the Commission's Orders in U-14975 are not moot even though AT&T no longer has a resale tariff on file with the Commission. Staff's Initial Brief, p 15.[8] Further, The actions by the Sixth

[8] Yet Staff also contends that the issue raised in the Complaint "does not precisely fall under the Commission Orders in Case No. U-14975." Staff's Reply Brief, p 3 (fn omitted). Further, Staff states in its Reply Brief that it believes that AT&T's argument that AT&T's argument that the proper claim to be brought here is one for breach of the parties' interconnection agreement. *Id.*

Circuit in addressing the ICB disclosure issue and remanding the case for the Commission to modify its Order also support this finding. It is also supported by the Commission's July 30 Order in Case U-16906 adopting language requiring disclosure in the context of the interconnections agreements at issue in that case.

As to the argument that the Complaint should be dismissed because of the Commission's actions in Case No. U-16906, several issues present in this case were neither addressed nor decided by the Commission in Case No. U-16906. These include past compliance with the October 4 Order, the issue of damages, the issue fines, the issue of attorney fees, and others. While the ALJ is mindful of the Commission's actions in that case, those actions are not grounds to dismiss the instant Complaint.

III.

VIOLATION OF THE COMMISSION'S OCTOBER 4 ORDER

A. The October 4 Order

CMC alleges that AT&T violated the Commission's October 4 Order in numerous ways, and thus violated MTA § 305(1), MCL 484.2305(l), which prohibits a provider of basic local exchange service from "[p]erform[ing] any act that has been prohibited by this act or an order of the commission." Complaint ¶ 31. Before addressing whether AT&T violated the October 4 Order, it must first

---

Nevertheless, Staff recommends that the ALJ find that AT&T did not violate the October 4 Order and dismiss CMC's Complaint on that basis. *Id.* at 9.

be determined what that Order actually requires, something about which the parties disagree.

The ALJ concurs with Staff's argument that the outcome of this case turns on the *CMC Sixth Circuit case*, because the Commission's October 4, 2011 Order mirrors the Court's holding. Staff's Reply Brief, p 6. As Staff and AT&T point out, when arguing before the Sixth Circuit, AT&T was not providing *any* portion of the ICB contracts that it had entered into with its customers. *Id.*; AT&T's Initial Brief, p 21. The Sixth Circuit summarized AT&T's position saying: "[U]nconsented disclosure of individualized contracts would constitute a violation of another of AT&T's duties under the Act: the duty to protect customer proprietary network information." *CMC Sixth Circuit case*, 637 F3d at 630. As such, AT&T was withholding its ICB contracts completely − absent customer consent. CMC argued that "AT&T is not truly offering its individualized contracts for resale because AT&T will not disclose any information about the contracts unless a competitor first obtains customer consent." *Id*. It is under this factual scenario that the Sixth Circuit opinion was issued.

After considering these arguments, the Court determined that "…AT&T is required by law to offer all of its retail services for resale, and this disclosure duty applies even when redaction cannot fully mask customer identity. Therefore, the commission erred in permitting AT&T to withhold completely the terms of its individualized contracts from competitors." *Id*. at 631. In its concluding paragraph, the Sixth Circuit held:

> "In conclusion, AT&T must disclose the terms of its individualized contracts to the extent necessary for CMC to understand the nature

> of what is being offered. The district court's holding is reversed in this respect, and the case must be remanded for the commission to modify its order. The district court's affirmance of the commission is otherwise upheld. The commission did not violate the Act by determining that AT&T's "similarly situated" requirement was not a restriction on resale. *Id*. at 633.

Thereafter, the case was remanded to the Commission, which issued its October 4 Order modifying its original Order to "reflect that AT&T Michigan may not completely withhold the terms of its ICBs from competitors, but must make available to them sufficient details such that the competitor can understand what is included in the offer. That requirement must be met even when the customer may be identified despite its name being redacted from the contract." October 4 Order, p 2.

CMC contends that the language "what is being offered" relates to AT&T's offer to CMC (or other CLECs). CMC's Initial Brief, pp 4-6. CMC also contends that the October 4 Order "cannot be interpreted as requiring only disclosure;" "cannot be interpreted as merely requiring disclosure when such disclosure is devoid of explication and unaccompanied with a conveyance of any understanding of what is being disclosed;" and "cannot be interpreted as requiring mere disclosure, especially when AT&T purposefully constructs a system to make access to the 'disclosed' information exceedingly difficult and unworkable. *Id.* at p 6.

Both AT&T and Staff contend that disclosure of ICBs (with some customer information redacted) is all that the October 4 Order requires. AT&T's Initial Brief, pp 22-24; Staff's Initial Brief, pp 19-20. Staff and AT&T also contend that CMC's reading of the October 4 Order (and the *CMC Sixth Circuit case*) has

evolved over time, from first requesting copies of ICBs or a simple listing of the applicable pricing conditions to later contentions that AT&T provide additional information and improve its web site. *See, e.g.,* AT&T's Initial Brief, pp 24-25; Staff's Reply Brief, p 8; Ex. CMC-1, CMC-2, CMC-4; CMC's Initial Brief, pp 6, 16-18.

The ALJ finds the arguments of Staff and AT&T persuasive on this issue, for the most part. The October 4 Order speaks in terms of disclosure of ICB contracts. That is what the Order requires. The Order does not address the methodology for that disclosure. Therefore, the ALJ rejects CMC's arguments that additional materials must be provided or that the web site must be set up in other ways to make it easier for CMC to search or review ICBs. The ALJ also agrees with Staff (and AT&T, for the most part) that the one claim by CMC at issue in this case is whether AT&T violated the October 4 Order by continuing to withhold, and by refusing to make available for resale, the terms of its ICB contracts. Complaint, ¶ 8; Staff's Initial Brief, p 2; AT&T's Initial Brief, pp 13-17; *see also*, 1 TR 206.

AT&T ignores for the most part, however, the language in the October 4 Order that the disclosure "must make available to [CLECs] sufficient details such that the competitor can understand what is included in the offer." October 4 Order, p 2. The ALJ interprets this as meaning the offer to AT&T's retail customer, not CMC. Nonetheless, there is an obligation here that needs to be fulfilled.

B. Did AT&T Violate the October 4 Order?

In its Initial Brief, CMC contends that AT&T violated the October 4 Order by: 1. failing to "offer" its ICBs for resale; 2. withholding the terms of its ICBs from CLECs; 3. failing to make details of its ICBs available so that CMC (or other CLECs) can understand what is included in the offer; 4. failing to act within a reasonable time to comply with the October 4 Order; and 5. constructing a system that made accessing the included details of AT&T's offer extremely difficult.[9] These will be addressed in turn.

1. Offer for Resale

The ALJ discussed above the nature of what is required by the October 4 Order – disclosure. Therefore, although stated in the Complaint, and discussed in CMC's Initial and Reply Briefs, the ALJ rejects CMC's claim that the October 4 Order explicitly dealt with the issue of offers to CLECs. All parties agree that there is a duty under the FTA to offer telecommunications services for resale. *See,* FTA § 251(c)(4); AT&T's Reply Brief, p 6. But that is not what the language of the October 4 Order addresses. CMC itself seems to recognize this when it discusses this in terms of a "federal duty." CMC's Reply Brief, p 2. Yet, CMC's Complaint alleges a violation of the Commission's October 4 Order, not the FTA. In addition, CMC has the burden of proof with regard to its Complaint. This requirement is set forth in the MTA and the Commission's Rules of Practice and Procedure. MCL 484.2203(8); Commission's Rules of Practice and Procedure, R

[9] CMC also raised the issue of how "individualized" AT&T's ICBs are. CMC's Initial Brief, pp 7-11. The ALJ agrees with AT&T that this issue is not relevant, was not raised in the Complaint, and need not be considered. AT&T's Reply Brief, p 12.

460.17515. Thus, CMC must show both that the October 4 Order itself required AT&T to make certain offers, and that AT&T failed to do so. The nature of the October 4 Order has been addressed, and although CMC raises some issues concerning the number, timeliness, and completeness of the ICB information provided by AT&T, CMC only indicated that it had requested to resell one AT&T ICB, in May of 2012. 5 TR 263. CMC admits that 415 ICBs were posted on the CLEC Online web site. CMC's Initial Brief, p 11; *see also* 6 TR 517. AT&T's witness Pellerin testified that AT&T activated the ICB portion of its CLEC Online in February, 2012. 6 TR 517. Based on the foregoing, the ALJ finds that CMC has failed to meet its burden of proof regarding its claim that AT&T violated the October 4 Order by failing to "offer" its ICBs for resale.

2. Withholding the terms of its ICBs from CLECs

Next, CMC claims that AT&T violated the October 4 Order by withholding the terms of its ICBs from CLECs, including CMC. AT&T claims that it has disclosed over 400 ICBs (and continues to add ICBs to the web site), and that it has disclosed all of the ICBs it is required to make available under the October 4 Order. AT&T's Initial Brief, pp 25-29; 6 TR 517-523. CMC argues that it had over 1500 ICBs provided in discovery in the federal litigation, but AT&T states that those contracts covered a far longer period of time. Moreover, despite extensive discovery, including several depositions, CMC failed to present any evidence that AT&T withheld the terms of its ICBs from CMC.[10]

[10] Issues relating to timeliness and the extent of the disclosure are addressed separately, below.

CMC claims that no competent, material, or substantial record evidence supports a finding that AT&T has posted all, or even most, of its ICB contracts on CLEC Online. CMC's Initial Brief, p 7. CMC has turned the burden of proof on its head. As noted above, CMC has the burden of proof with regard to its Complaint. MCL 484.2203(8); Commission's Rules of Practice and Procedure, R 460.17515. It was CMC's obligation to support this claim, and the ALJ finds that it failed to do so.

3. Failure to make details of ICBs available so that CMC (or other CLECs) can understand what is included in the offer

CMC contends that AT&T failed to make details of its ICBs available so that CMC (or other CLECs) can understand what is included in the offer. As noted above, the ALJ has found that the "offer" at issue is the offer to AT&T's retail customer. CMC's argument on this issue covers three areas. First, CMC complains that AT&T's witness Pellerin testified that some of the more complicated posted ICBs contained terms that are "not readily apparent on the face of the contract." CMC's Initial Brief, pp 10-11; 6 TR 591; Ex CMC-28, ¶7. CMC also complained that AT&T had failed to sort the 415 posted ICBs into buckets separating the contracts containing all relevant terms from the other ICBs. CMC's Initial Brief, p 11. Finally, CMC complained that AT&T's witness Pellerin testified that some of the express conditions that appeared on the face of some posted ICBs were not relevant and did not need to be met by a CLEC's customer. *Id.*; 6 TR 587-588, 591-594, 598.

AT&T argues that the October 4 Order did not require disclosure of the information identified by CMC. AT&T's Reply Brief, pp 12-16. Staff does not explicitly address this issue, but states in general that AT&T is in the process of disclosing its ICBs and is complying with the October 4 Order. Staff's Reply Brief, p 8.

The ALJ finds this issue troublesome. Although AT&T has disclosed hundreds of ICBs, the fact that the terms disclosed may not include all of the terms which impact the ICB, or may contain terms that do not, in reality, apply, raises a question as to whether AT&T has complied with the October 4 Order's requirement that AT&T must make available the terms of its ICBs to CLECs with "sufficient details such that the competitor can understand what is included in the offer." October 4 Order, p 2. If there are terms not included, or terms that are included that do not apply, how is the CLEC to understand what is included in the offer? The ALJ recognizes that the Commission has adopted language for a joint determination on whether customers are "similarly situated" (the "more complex" ICBs) in Case No. U-16906. July 30, 2012 Order on Remand, MPSC Case No. U-16906, p 10. Using this order as guidance, it is apparent that something other than looking at a web site may be necessary to finalize issues relating to reselling an ICB, especially a complex one. But the fact that there may be terms in an ICB that do not apply would seem to make it virtually impossible to discern what is included in the offer. AT&T contends that this should also be a matter jointly determined by AT&T and the CLEC, and a matter to be determined in an interconnection arbitration. AT&T's Reply Brief, pp 15-16.

The ALJ is persuaded that CMC has failed to meet its burden here, though this determination is a close one. CMC had ample opportunity to take discovery, and it cannot rely on Ms. Pellerin's lack of personal knowledge to make its case, especially given that CMC was before the ALJ on a motion relating to deposing another AT&T representative, which was taken under advisement with the explicit understanding that if CMC was unable to get answers to its questions from deposing Ms. Pellerin, CMC was free to set up a conference call with the ALJ and other counsel to address the need for an additional deposition. 3 TR 147. There was never any further contact from CMC on the need for such an additional deposition.

4. Failure to act within a reasonable time to comply with the October 4 Order

CMC next contends that AT&T failed to act within a reasonable time to comply with the October 4 Order. Although CMC discusses confidential information in this section of its Initial Brief, that information is not necessary for a resolution of the issue. CMC first discusses AT&T's failure to disclose its ICBs after the *CMC Sixth Circuit case* opinion was issued and before the issuance of the October 4 Order. CMC's Initial Brief, p 15. The ALJ finds that this time period is simply irrelevant to a case predicated on AT&T's failure to comply with the October 4 Order. CMC then argues that AT&T took too long to disclose the necessary ICB information after the October 4 Order. *Id.*

AT&T's witness Pellerin testified that AT&T provided 26 ICBs to CMC on November 10 and 11, 2011. 6 TR 517. She also testified that AT&T sent an

Excel workbook with a spreadsheet for each of three common ICBs – Fire Sale, MetroBlitz, and Big Easy. 6 TR 569. Finally, she testified that the CLEC Online section dealing with ICBs went live in February, 2012. 6 TR 517.

CMC counters that the Excel workbooks and spreadsheets were provided in response to ongoing federal litigation and thus not available for resale. CMC's Reply Brief, pp 6-7. CMC also argues that it took nearly 5 months before it had access to more than the 26 manually provided ICBs.

Staff states its opinion that AT&T is in the process of fulfilling its disclosure duty, albeit slowly, and should continue to do so without any further delay. Staff's Initial Brief, p 20. Staff also concludes that AT&T is complying with the October 4 Order. Staff's Reply Brief, p 8. It thus recommends that the ALJ find that AT&T did not violate the October 4 Order and dismiss CMC's Complaint. *Id.* at 9.

The October 4 Order does not contain any mention of a time frame or methodology for AT&T to comply with that Order's disclosure directives. The ALJ is certainly aware of the lengthy litigation between these parties regarding ICB disclosure and resale. The ALJ is also aware of the financial burden on CMC and benefit to AT&T caused by delay in disclosure. Nevertheless, the ALJ is not persuaded that AT&T's actions in this case constitute such unreasonable delay as to comprise a violation of the October 4 Order. Although AT&T certainly has been in no rush to disclose ICB information, the lack of specific guidelines on a timetable, and AT&T's not-unreasonable decision to disclose ICB information on CLEC Online, convinces the ALJ that CMC has failed to prove that AT&T violated the October 4 Order.

5. AT&T's CLEC Online System

CMC argues that AT&T violated the October 4 Order by constructing a system (CLEC Online) that made accessing the included details of AT&T's offer extremely difficult. The fact that the October 4 Order does not discuss or require any particular methodology for disclosure has been discussed previously. Thus, the ALJ already rejected CMC's arguments that the web site must be set up in other ways to make it easier for CMC to search or review ICBs. *See* Section III.A., above.

CMC's remaining complaints relate to password issues, the initial labeling of the section of CLEC Online, AT&T's alleged attempt to "hide" the ICB disclosure, and the failure of AT&T to issue an Accessible Letter announcing the posting of ICBs on CLEC Online. CMC's Initial Brief, pp 16-18. Password problems and content labeling issues are not uncommon in setting up a new, secure portion of a web site. CMC's witness Champagne testified that he had been able to access the CLEC Online database and review lots of ICB contracts. 5 TR 345. AT&T's placement of the ICB database in a secure area linked to the Michigan portion of the site was also not unusual given the sensitive nature of the information. AT&T's actions were not shown to be deliberate hiding of information. As to the Accessible Letter issue, the October 4 Order provides no specifics in this regard; therefore, the ALJ is not persuaded that AT&T's failure to issue one constitutes a violation of the October 4 Order. Based on the foregoing, the ALJ finds that CMC has not demonstrated that AT&T violated the Commission's October 4 Order regarding these issues.

IV.

DAMAGES

Having found that CMC has failed to prove that AT&T violated the October 4 Order, a discussion of CMC's claimed damages is unnecessary.[11] Nevertheless, the ALJ does want to briefly indicate that CMC's damage claim is defective, and address a few of the reasons why. First, CMC calculated its damages based on one contract for which CMC's own witness Champagne admitted that the vast majority of CMC's customers were ineligible. 5 TR 273. That contract (Confidential Ex ATT-2) was a MiDEAL contract for which numerous conditions needed to be met for eligibility. CMC produced no evidence that its customers were eligible, yet CMC calculated its damages as if 100% of its customers were eligible. AT&T's Initial Brief, pp 49-51.[12]

In addition, AT&T contends that CMC made numerous other calculation errors in computing its alleged damages, including using the wrong wholesale discount rate calculating damages, and including features and late payment charges. AT&T's Initial Brief, pp 46-47.

Further, CMC changed its damage claim to a request for a bill credit near the end of the case. As both Staff and AT&T point out, this makes it much more like a billing dispute that would be the subject of the parties' interconnection agreement. Staff's Reply Brief, pp 8-9 (fn 4); AT&T's Reply Brief, pp 22-24.

[11] Likewise, a discussion of fines and attorneys fees is unnecessary. The ALJ will not address those issues as there was little or no evidence presented on these issues, only some argument in the Briefs that need not be addressed.

[12] AT&T also argued that the contract was "stale" based on the Commission's recent holdings in Case No. U-16906. AT&T's Initial Brief, pp 40-44.

Moreover, the record is clear that CMC did not follow the billing dispute procedures in its interconnection agreement. *See,* AT&T's Initial Brief, pp 34-37.

CMC bears the burden of proof regarding its damages, and the discussion above identifies some of the reasons that the ALJ believes that CMC's proofs on its damages were defective.

V.

CONCLUSION

In accordance with the above, the ALJ recommends that AT&T's Motion to Dismiss and Renewed Motion to Dismiss be denied. The ALJ finds that CMC has failed to prove that AT&T violated the Commission's October 4, 2011 Order on Remand in MPSC Case No. U-14975. Therefore, the ALJ recommends that the Commission dismiss CMC's Complaint in this case.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Thomas E. Maier

Digitally signed by Thomas E. Maier
DN: cn=Thomas E. Maier, c=US, email=MaierT@michigan.gov
Date: 2012.11.27 16:11:19 -05'00'

Thomas E. Maier
Administrative Law Judge

November 27, 2012
Lansing, Michigan